1965

J. B. & R. E. Walker, Inc. v. J. Kenneth Thayn dba Thayn Construction Co. : Brief of Respondent

Utah Supreme Court

Clarence Jack Frost; Attorney for Appellant;
H. Arnold Rich; Leonard W. Elton; Attorneys for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

J. B. & R. E. WALKER, INC., a Utah Corporation and J. B. WALKER and GUDVOR W. BRABY, dba WALKER SAND & GRAVEL COMPANY, a partnership,
Plaintiff - Respondent,

— vs. —

J. KENNETH THAYN dba THAYN CONSTRUCTION COMPANY,
Defendant - Appellant.

Case No. 10224

BRIEF OF RESPONDENT

Appeal From the Judgment of the Third District Court
For Salt Lake County, Utah
HONORABLE STEWART M. HANSON, *Judge*

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STATEMENT OF FACTS

Respondent does not agree with the Statement of Facts or Statement of the Case as set forth in Brief of Appellant; primarily they are so inadequate and inaccurate as to be of little or no aid to this Court in understanding the issues presented to and determined by the Trial Court from which this appeal is taken. Respondent,

therefore, deems it important to restate the case so far as it relates to the points argued by Appellant.

This appeal is concerned with only the first cause of action and the defenses presented by the pleadings and attempted to be established by the evidence.

ISSUES: Plaintiff's first cause of action alleges the making of a lease on April 11, 1961, between the corporate plaintiff and defendant; that defendant had breached the contract by (1) assigning and conveying the same without the written consent of plaintiff, contrary to its written terms; (2) by failure to pay taxes and rental as required by the lease terms; and (3) by failure to cause the leased area to be surveyed and fenced as required by the lease. (R. 1, 2, 3, 9 and 10).

Defendant admitted making the lease but denied that he had violated its terms; denied that he had assigned the lease; and alleged that his failure to pay taxes and rentals was due to plaintiff's failure to designate and survey the particular area to be covered by the lease. (R. 21). Thereafter, in response to an affidavit by plaintiff alleging that the denial was untrue, sham and frivolous, (R. 25, 26) that plaintiff had seen such an assignment to one James C. Sumsion, defendant then (R. 31) alleged that if plaintiff was referring to the agreement between defendant and Richard Sumsion and James Sumsion, such agreement was only temporary and tentative and that defendant had discussed the agreement with plaintiff. Defendant, shortly before trial, then filed another amendment to his answer alleging that if the Court found that there was such an assignment, plaintiff had waived any objections to it.

The complaint further alleged that plaintiff had served a notice of termination, but defendant would not remove himself from the leased premises; that defendant was continuing in possession by his assignee, Sumsion; that defendant was denying any violation; and that it was essential to have the Court declare whether there had or had not been a termination of the lease by reason of the violations by defendant.

These were the issues presented by the pleadings, so far as the first cause of action was concerned.

FACTS: There was little or no dispute as to the essential facts; they were either stipulated or admitted. The particular leasehold provisions (R. 9) are as follows:

> "1. The Lessor hereby leases to the Lessee, for a term of fifteen (15) years, from the date of execution of this agreement, sufficient property located on the east side of Wasatch Boulevard, approximately three hundred feet north of the road-base storage area, occupied by Lessor, all in Section 23 and 24, Township 2 South, Range 1 East, Salt Lake Base and Meridian, for the purpose set forth hereinabove, with the further provision that the Lessee, taking into consideration the requirements necessary, will designate the area needed, which area will then be surveyed and the description of said property will be attached hereto and made a part hereof, as a supplemental agreement.
>
> "3. The Lessee agrees to pay the Lessor the sum of One ($1.00) Dollar per year, plus the prorata property tax, as lease rental for the premises described herein.
>
> "4. The Lessee shall have the right to bring upon, install and operate upon the leased prem-

ises, all of the equipment of whatver kind necessary to operate and maintain the machinery enumerated hereinabove; provided, however, that all operations of the Lessee upon said property shall be in such a manner as not to create a nuisance or a hazard to the public; that the property be adequately fenced; and that existing laws and regulations of the State of Utah be complied with in the operation of said premises, machinery and equipment.

"8. The Lessee agrees not to assign this lease or any part thereof or any of the rights hereunder, without first obtaining the written consent of the Lessor."

Under date of November 12, 1963, defendant made an agreement, (Ex. P-1) with Richard Sumsion and James C. Sumsion, which was admitted in evidence without objection. (R. 62-64). The pertinent portions are as follows:

"This Agreement made and entered into this 12th day of November, 1963, by and between J. KENNETH THAYN, doing business as THAYN CONSTRUCTION COMPANY, hereinafter called 'THAYN' and RICHARD M. SUMSION, and JAMES C. SUMSION, jointly, hereinafter called 'SUMSION,' and

"WHEREAS, Thayn is the owner of a certain lease-hold interest which he desires to assign to Sumsion, and

"WHEREAS, Thayn is the owner of certain personal property which he desires to sell to Sumsion, and

"WHEREAS, Sumsion desires to lease the said lease-hold interest and to buy the said personal property,

"NOW, THEREFORE, in consideration of the mutual covenants of each of the parties, IT IS HEREBY AGREED:

"1. That there is a certain lease-hold agreement between J. B. & R. E. Walker, Inc., as Lessors, and J. Kenneth Thayn, as Lessee, which lease is represented by an agreement, a copy of which is attached as Exhibit 1. Thayn is the owner of a certain agreement dated April 11, 1961, between himself and J. B. Walker and Gudvor W. Brady, a copy of which agreement is attached, incorporated and made a part of this agreement as Exhibit 2.

"2. Thayn does by this instrument assign to Sumsion all right, title and interest that he has in the said agreements attached as Exhibit 1 and Exhibit 2 for the remaining portion of the term and Sumsion agrees to pay Thayn for said agreements the sum of One Dollar ($1.00) per year, said payment to be made on or before the 10th day of April of each year, commencing with the 10th day of April, 1964, except that if Sumsion fails to make payments as agreed upon in paragraph 8, this lease-hold shall revert back to Thayn.

"3. In the event that Sumsion is compelled to cease operation in respect to the asphalt hot plant operation within a period of two (2) years from the date of this agreement as a result of court order, Thayn shall move and erect original equipment at his expense to any location in Salt Lake County designated by Sumsion. Sumsion shall assume all costs of securing property or lease at the new designated location and all other expenses beyond said move and erection.

"4. It is contemplated that Sumsion will place upon the leasehold property buildings, fixtures

and other improvements, which will remain the property of Sumsion and at the expiration of this lease agreement, or if the said agreement is terminated by any means, Sumsion shall have the right to remove all buildings, fixtures and improvements placed upon the said property, including fences."

On January 1, 1964, plaintiff sent a statement to defendant for $1,050.00 for a proportionate share of the taxes for the years 1961, 1962 and 1963 (Ex. P-2). Defendant admitted that he received the statement, had not paid it and had paid no taxes or other amounts called for by the statement (R. 64 and Ex. P-2).

Defendant admitted that he never designated the specific area to be occupied by him (R. 65). No fence was ever erected (R. 76). No consent in writing to the assignment was ever had (R. 78, 79).

Sumsion knew and understood that defendant could not assign the lease without the written consent of plaintiff (R. 81, 82). Shortly thereafter Sumsion went into possession (R. 83) and then came to request plaintiff to approve the assignment (R. 84) and was informed by letter as to the terms upon which an approval could be obtained. Sumsion has remained in possession and purchased material and occupied the premises under a tentative arrangement with plaintiff until the matter was settled.

No adjustment of the problem having been had, plaintiff then served the notice of termination on April 10, 1964. (Ex. P-3).

ARGUMENT

POINT I

THE COURT DID NOT ABUSE ITS DISCRETION IN SETTING THE FIRST CAUSE OF ACTION FOR TRIAL AS APPROPRIATE FOR DECLARATORY JUDGMENT IN ADVANCE OF HEARING ON THE OTHER CAUSES OF ACTION.

The Complaint alleges eight causes of action. The first cause alleges the dispute as to whether the leasehold agreement has or has not been terminated by reason of the breaches by defendant and the notice of termination by plaintiff, with defendant remaining in possession by and through his assignee, Sumsion.

The remaining causes of action have to do with responsibility for costs of litigation instituted by neighbors for claimed creation of nuisance, and efforts by the County to abate the operations of defendant under the zoning laws. In addition there were claims for damages for failure to pay for materials delivered.

It is clearly evident that the first cause of action is severable from the others; and there was no reason for tying up this property under a contract that had been terminated by breach and that had resulted so disastrously to the contracting parties, not only in cost of litigation but also in disclosure of contract deficiencies as a basis for a working agreement. Defendant testified (R. 69), that the lease contract was drawn without legal assistance, and it was not adequate in its provisions as to who should bear the burdens of defending nuisance actions instituted by reason of the hot plant operations

of defendant. In characteristic fashion defendant refused to assume the cost of defense of these matters, and plaintiff had no alternative but to defend his right to conduct hot plant operations on his ground.

There were three grounds alleged for rescission about which there was no material dispute: (1) assignment of the contract without written consent; (2) failure of defendant to designate and fence the area occupied; and (3) refusal to pay the taxes on that portion of the tract; all of which were clearly set forth as obligations of the defendant in the contract, and all of which had been violated by defendant.

The complaint was filed May 6, 1964, and on May 26, 1964, defendant obtained an order giving him to and including June 2, 1964, within which to answer; and then he filed only denial of the alleged violations.

Plaintiff thereupon filed an affidavit as to the fact that the denial was sham and untrue, and moved the Court for an order setting the case for immediate trial of the first cause of action. This motion was argued on June 12, 1964. Thereafter the trial was set for July 9, 1964, and then reset for July 21, 1964, before Hon. Stewart M. Hanson.

As soon as defendant received the first notice of setting on July 1, 1964, he immediately filed numerous papers amending his pleadings and setting up many reasons why the trial should not be had. All of these matters were heard by the Court at the time set for

hearing, and the objections were over-ruled and the case was heard. Defendant was given the fullest opportunity to present whatever evidence he had, and defendant's brief does not show any prejudice to defendant. He had had two and a half months to prepare his defense. It is difficult indeed to say that you haven't assigned a lease when the written assignment is before the Court; and it is difficult to show that you have paid the taxes when you have to admit that you haven't; and it is impossible to say that the other fellow is to designate the area and do some fencing when the contract expressly says that you are to do it. Defendant had nothing to go on, and he didn't go anywhere.

This case comes squarely within the provisions of Sec. 78-33-1, Sec. 78-33-2 and 78-33-3 of the Judicial Code relating to Declaratory Judgments. It also comes squarely within the purview of Rules 56 and 57.

Only the wildest imagination would cause an individual to say that a decree declaring a leasehold contract to be terminated is not final as to the existence or non-existence of the document as a binding document.

POINT II

THE COURT DID NOT ERR IN FINDING THAT DEFENDANTS' ACTIONS HAD GIVEN PLAINTIFF THE RIGHT TO TERMINATE, CANCEL AND ANNUL THE RIGHTS OF DEFENDANT TO THE LEASEHOLD AGREEMENT.

The Court properly found the lease had been terminated by reason of breaches of the agreement by defend-

ant; and properly held there had been no waiver by plaintiff.

As before stated, plaintiff relied upon three breaches for its right of termination: (1) assignment without written consent; (2) failure to pay taxes; (3) failure to designate the area to be utilized and to fence the same.

The facts were undisputed as to each and all of the breaches. Defendant admitted that he had never had written consent to the assignment; that he had never paid the taxes and that he had never designated the area to be occupied nor fenced the same.

The English language seems to have little or no meaning to defendant. The lease agreement expressly provides in Paragraph 1 that the *lessee* will designate the area needed, have it surveyed, and the area thus described will be added as a supplement to the agreement, which was never done. Paragraph 3 expressly provides that the *lessee* agrees to pay to the lessor the pro-rata of property taxes based upon the ratio of that area to the whole tract. Paragraph 4 expressly provides that the *lessee* will fence the area. The only answer defendant makes to this failure is stated by the attorney for defendant, Mr. Frost, in the following language:

> "Yes we will admit that he did not, and we will contend that this is an agreement and obligation of Walker as provided in the agreement."

Apparently the English language means no more to the attorney for defendant than it does to defendant himself.

On Page 16 of the transcript, Mr. Thayn says the reason he did nothing about fencing was because Mr. Walker was supposed to designate the area.

On the taxes he says the reason he didn't pay the taxes was because the County was supposed to segregate the amounts. On Page 17 he says he didn't make the tax payment because the County hadn't said it was fair. By the simple process of failing to designate the area, he felt entirely relieved from all responsibility to pay taxes on the tract occupied by him, and yet this was the only rental he was supposed to pay aside from the nominal amount of $1.00 per year, which he didn't pay either. The defendant tried to appear "dumb," somewhat of a country bumpkin who didn't quite understand the meaning of words. His failure to put up any money, even for taxes, while occupying the premises rent free for three (3) years, from April 11, 1961, to the date of termination on April 10, 1964, shows, however, that he was not as dumb as he tried to appear; and in selling his equipment to Sumsion for $128,000 with $25,000 down and interest at 5%, shows that he seems to know his finances o.k.

Just before trial defendant abandoned his denials, abandoned his position that the assignment was not the real thing but tentative only, and finally came to rest upon the allegation that plaintiff had waived the alleged breaches.

There was no evidence whatsoever that plaintiff waived the requirement to designate the area or to pay the taxes or to fence it, and the nearest that defendant

came to proving even the slightest semblance of a waiver is contained on Page 69 of the transcript wherein Mr. Thayn testified that sometime prior to the time he made the deal with Mr. Sumsion, he told Mr. Walker that he was getting old and that he would like to get out of hard construction work, and he had talked with Mr. Sumsion, and Mr. Walker thought it would be a good idea (R. 69-70).

He also produced evidence that Mr. Walker knew that Sumsion had gone into possession and that Mr. Walker thereafter made some sales to Sumsion and that Walker made no objection to Mr. Sumsion operating the property (R. 73). However, it then appeared upon cross-examination (R. 78-79) that the agreement between defendant and Sumsion was prepared by the attorneys for the parties, and the following evidence was produced upon cross-examination of Mr. Thayn (R. 78):

> "Q. Did you or anyone else, at that time, advise Mr. Sumsion or any of his attorneys that your original lease with Walker was not assignable unless you got his consent in writing?
>
> "A. I think they were aware of it because —
>
> "Q. Thank you. That answers it. As a matter of fact, Mr. Thayn, at any time, including to the present day, have you ever obtained a consent in writing from the Walkers regarding your right to assign that lease?
>
> "A. Well, I don't know as it has been particularly put that way. We told them they were going up there, and they gave

> us an agreement. Don't try to answer me if I am dumb. Let it go that way, but the way you put it isn't the truth."

Mr. Richard Sumsion, called as a witness for defendant, testified that when he made this agreement with Mr. Thayn he read the agreement, that he read the covenant in there that Thayn was not to assign the lease without the written consent of Walker (R. 81); that he definitely understood it (R. 82); that after making his agreement with Thayn he and his attorney came up to the office of the attorney for Walker with the request the Walker approve the assignment of the contract, and that thereafter he received a letter setting forth the reasons why it could not be done. He then made an independent arrangement with Mr. Walker under which he had been receiving and purchasing material pending a settlement of this litigation with Mr. Thayn; that his occupancy of the premises and purchase of materials was under that tentative memorandum, not under the Thayn lease.

It will thus be seen that while defendant quotes law with reference to waiver, his facts do not fit the law; there was no waiver, and the Court found that there was no waiver, and the evidence sustains the finding.

This case come squarely within the provisions of three Utah cases. They represent the law of this case as pronounced by this Court and as followed by the District Court: *Powerine Company vs. Russell's, Inc., et al,* 103 Utah 441, 135 P.2d 906; *Powerine Company vs. Zions Savings Bank & Trust Company,* 106 Utah 384,

148 P.2d 807. In this case the Court restated its findings in the former case in the following language:

> "That the lease executed by defendant John H. Russell, leasing certain real property to plaintiff was not assignable, and therefore by assigning such lease plaintiff breached its conditions so that John H. Russell was entitled to recission."

To similar effect is the most recent case of *Gates vs. Daines,* 3 Ut.2d 95, 277 P.2d 458.

In this connection it is very significant that the agreement (Ex. P-1) between Thayn and Sumsion provides in Paragraph 3 that in the event Sumsion is compelled to cease operation in respect to the asphalt hot plant within a period of two years as the result of court order, "Thayn shall move and erect original equipment at his expense to any location in Salt Lake County designated by Sumsion." This is certainly a most unusual provision to be contained in a contract based upon an assumption that consent has been obtained to assignment of the lease, and that the equipment was to remain on the property during the period of the lease term in accordance with the provisions of the lease from Walker to Thayn. It is more consistent with the idea that the parties knew they were doing something which might or might not be approved or which might or might not result in litigation, and were providing a way out for the parties themselves without regard to Walker or anyone else.

POINT III

THE COURT DID NOT ERR IN FINDING THAT THE AGREEMENT BETWEEN DEFENDANT AND SUMSION WAS AN ASSIGNMENT, NOT A SUB-LEASE.

The agreement on November 12, 1963, between Thayn and Sumison is an assignment, not a sub-lease.

Here again defendant quotes law to the effect that a sub-lease is not a violation of a covenant against assignment, but the facts do not fit the law. Paragraph 8 of the lease forbids "assignment of the lease or *any part thereof* or any of the rights hereunder" without first obtaining the written consent of the lessor. The restriction is broader than ordinary restrictions. Obviously the reason for it was the fact that the lessee was paying little or nothing for the privilege of occupying the premises ,and the lessor was reserving to himself the right to determine who would or would not be the occupant, and the conditions under which the occupancy was to be had. It was entirely within the right of Walker to refuse assignment of a lease which had proven so fruitful of litigation with neighbors, the County, and even with the defendant himself. If the clearest English and the most positive obligations with reference to fencing, designation of area, and payment of taxes could not be understood by defendant, and the clearest of language against assignment of the leasehold rights or any part thereof, or any interest therein, could not be comprehended and understood by anyone as successful as Mr. Thayn and as intelligent as his counsel, what then was the use of perpetuating that document by having it assigned to others?

It is little short of an affront to the intelligence of this Court to argue that the following words, "Thayn does by this instrument assign to Sumsion all right, title and interest that he has in said agreements attached as Exhibit 1 and 2 for the remaining portion of the term" does not mean what it says. Nothing whatsoever is reserved to Thayn save and excepting that it is provided in the same paragraph that if Sumsion fails to make payments on the purchase price of equipment he is buying, the leasehold shall revert to Thayn. There was no reversionary interest as referred to in the authorities cited in the brief, nor was the occupancy of the premises by Sumsion to be in any way contingent upon or subject to any supervisory right of Thayn during the lease term. The document was what it states — a complete assignment of the lease and to be absolute and not contingent in any way if Sumsion made the payments for which he was legally obligated. There was no such thing as a reversionary interest as such an interest is known in the law.

This point is raised now for the first time on appeal. Defendant never pleaded that the assignment was in fact a sublease. He denied it existed; then said it was tentative only; and then said it was waived; but he never presented to the Trial Court the proposition that it was in fact a sub-lease. Nevertheless, he was wrong here as he was in the other positions that he took.

CONCLUSION

Plaintiff submits to this Court that the matter was properly handled by the District Court, properly decided, and should be affirmed.

Respectfully submitted,

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